RECORD
AND
BRIEF

No. 16-300

IN THE

Supreme Court of the United States

ERNST & YOUNG LLP and ERNST & YOUNG U.S. LLP,

Petitioners,

—v.—

STEPHEN MORRIS and KELLY MCDANIEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN SUPPORT OF PETITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§157, 158, which establish a statutory right for employees to "engage in ... concerted activities for the purpose of ... mutual aid or protection," render unlawful a term of an arbitration agreement that requires arbitration of an employee's work related disputes to be conducted individually and in "separate proceedings."

2. Whether Section 2 of the Norris-LaGuardia Act, 29 U.S.C. §102, taken together with Section 3 of the Norris-LaGuardia Act, 29 U.S.C. §103, removes the jurisdiction of courts of the United States to enforce the contractual term referred to above.

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 2 of the NLGA provides:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. §102.

Section 3 of the NLGA provides:

> Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court.

29 U.S.C. §103.

Section 15 of the NLGA provides:

> All acts and parts of acts in conflict with the provisions of this chapter are repealed.

29 U.S.C. §115.

STATEMENT OF THE CASE

This Court now has the opportunity to resolve whether a contractual term barring employees from seeking legal redress through "concerted activity," a term which is unlawful under the National Labor Relations Act ("NLRA"), must be enforced if it is included in an arbitration agreement. The issue of the interplay of the Federal Arbitration Act ("FAA") and the NLRA in such cases has bedeviled the lower courts, deeply split the Circuits as illustrated by four pending petitions for certiorari, and left employees and employers in unacceptable uncertainty as to how employment disputes are to be resolved.

This case illustrates the wisdom of Congress in enacting the NLGA and the NLRA, and protecting worker's right to engage in "concerted activities" for

their "mutual aid and protection."[1] Absent a right to collectively pursue employment related disputes, statutorily guaranteed employee rights can be easily evaded. This case also uniquely presents all of the questions this Court must address on review. There is well developed reasoning and a robust dissent in the Court of Appeals below. The remedy imposed by the Ninth Circuit which is unique among the four cases for which petitions have been filed, also deserves consideration by this Court. The Ninth Circuit invalidated the term of the arbitration agreement that is prohibited by the NLRA, but remanded to the District Court to determine the severability of that clause under the terms of the parties' contract. Respondents believe this case is therefore the best vehicle for the Court's review of the issues presented.[2] For those reasons, among others, Respondents support Petitioners' petition for certiorari.

Respondents are two of approximately 40,000 employees of Petitioners. They allege that many thousands of employees, perhaps tens of thousands of employees, were and are unlawfully misclassified as exempt from receiving statutorily required overtime payments. Those employees were and continue to be denied overtime payments and other payments to which they are entitled under Federal and State Labor Laws.

Respondents' claims and earlier actions by other similarly misclassified employees of Petitioners, have

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[1] *See*, 29 U.S.C. §§102, 103, 157, 158.

[2] We believe that certiorari also should be granted to National Labor Relations Board ("NLRB") in *NLRB v. Murphy Oil*, No. 16-307. The special expertise of the Board and the Solicitor General will undoubtedly be of substantial assistance to the Court.

been in the courts for over a decade.[3] None of those claims were addressed on the merits because of the prohibition on "concerted activities" in Petitioners' arbitration agreements.[4] As a result, perhaps as many as 100,000 or more employees were denied the opportunity to have their statutory rights adjudicated over the last decade. Federal law, if properly read, protects employees from such inequitable results.

Section 7 of the NLRA protects the right of employees to engage in "concerted activities" to address workplace grievances. Section 8 renders unlawful any "interfere[nce]" or "restrain[t]" of that right. This Court, and several Circuits, recognize that the right to engage in "concerted activities" includes the right to pursue legal redress collectively. 3a, 7a.[5] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566, (1978). However, as a condition of their employment, Respondents were required to agree to arbitrate all employment disputes. The arbitration agreement contained a term (the "Separate Proceedings Clause") that requires employees to arbitrate their employment disputes only individually and only in "separate proceedings." 2a.

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[3] *See, Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013), cert. denied, 2014 U.S. LEXIS 6848 (individual arbitration ordered), *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013)(individual arbitration ordered); *Ho v. Ernst & Young LLP*, No. C-05-04867 RMW, 2012 U.S. Dist. LEXIS 3524, at *2 (N.D. Cal. Jan. 11, 2012)(*consolidated with Richards, still pending*).

[4] In *Sutherland*, to "effectively vindicate" her claims in an individual arbitration, "[Plaintiff] would be required to expend approximately $200,000 to recover less than $2,000." *Sutherland v. Ernst & Young LLP, supra.*, 726 F.3d at 295.

[5] References to the appendices annexed to the Petition are cited "____a" with appropriate page references.

In its decision below, the Court of Appeals found the Separate Proceedings Clause to be unlawful under the plain meaning of the Sections 7 and 8 of the NLRA. 10a, 11a. The same finding of illegality was compelled as a matter of law under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984) and *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

The National Labor Relations Board (the "NLRB" or the "Board"), the agency with authority to enforce the NLRA, "has interpreted Sections 7 and 8 to prohibit employers from making agreements with individual employees barring access to class or collective remedies. *See D.R. Horton*, 357 N.L.R.B. No. 184, at *5, 357 N.L.R.B. 2277, at 2280. The Board's interpretations of ambiguous provisions of the NLRA are 'entitled to judicial deference.'" *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016)(additional citations omitted).

Petitioners, the Dissent below, and a chorus of amici, argue that this Court's "arbitration jurisprudence" requires the courts to "rigorously enforce" the arbitration agreement "in accordance with its terms." *See* Pet. at 18. By "arbitration jurisprudence" Petitioners and their allies mean the constellation of cases decided over the past thirty years that have upheld enforcement of arbitration clauses over various objections in varying contexts. The overly simple conclusion they reach from this variety of disparate cases is that an arbitration clause always prevails as written.

The sole exception Petitioners and their allies find, is where there is a "contrary congressional command" in a statute. That command must explicitly refer to the FAA or arbitration in order to

negate the arbitration right established in the FAA. In the absence of such a "contrary congressional command" in the NLRA, Petitioners and the Dissent below argue that this Court's "arbitration jurisprudence" demands that the arbitration agreement's terms be enforced, irrespective of illegality under the NLRA. Pet. at 16-17.

The "savings clause" in FAA Section 2 denies enforcement of an arbitration agreement or term "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Based on the "savings clause," Chief Judge Thomas found no conflict between the FAA and the NLRA, because illegality under federal law is a "ground for the revocation of any contract." 14a. Chief Judge Wood reached the same conclusion in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016) (hereinafter *Epic*).

Petitioners and the Dissent reject that analysis. They claim that under this Court's "arbitration jurisprudence" this Court "does not apply the saving clause to federal statutes." 39a, Pet. at 9. This Court has never adopted such a rule. Rather, this Court recognizes that "Congress rather than the courts controls the availability of remedies for violations of statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165, (2008), *quoting, Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509, n. 9, (1990) (internal citations omitted). That iron clad requirement embodied in the Separation of Powers doctrine cannot be overcome by this Court's policy judgments with respect to arbitration. We do not believe that this Court intended such a result.

Nor is it true, as Petitioners, the Dissent below, and the amici argue, "that Congress must speak ...

explicitly in order to convey its intent to preclude arbitration of statutory claims. [The Court] never said as much, and on numerous occasions [the Court] held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 109 (2012)(Sotomayer, J., concurring).

Under standard statutory construction and analysis of potential conflicts between two federal statutes, the FAA and the NLRA are easily harmonized. The NLRA renders the Separate Proceedings Clause unlawful, and the savings clause in the FAA ***precludes enforcement of that clause***. Not enforcing that one clause does not render the arbitration agreement unenforceable as a whole unless the arbitration contract's severability clause requires that result. In the decision below, the Court of Appeals remanded to the District Court for a determination of whether the contract provides for the arbitration clause to survive. 24a.

The Court of Appeals' decision is in perfect harmony with the requirements of both the FAA and the NLRA. Accordingly we respectfully believe that the decision of the Court of Appeal should be affirmed.

However, if instead the reasoning of the Dissent is adopted, that would directly raise the question of whether the courts of the United States have jurisdiction to enforce a contract that restricts the right of employees to "engage in ... concerted activities for the purpose of ... mutual aid or protection." Section 2 of the Norris-LaGuardia Act, 29 U.S.C. §102, taken together with Section 3 of the Norris-LaGuardia Act, 29 U.S.C. §103, eliminates the

jurisdiction of courts of the United States to enforce such a contractual term.

THE REASONS FOR GRANTING THE WRIT

A. The Issues Presented By This Case Are Exceptionally Important.

The unusual circumstance of the pendency of four petitions from four separate conflicting Circuit Court opinions, all filed within days of each other, show a deep conflict between the Circuits[6], and the exceptional importance of the issues presented by this petition to the Ninth Circuit Court of Appeals. *See NLRB v. Murphy Oil*, No. 16-307 (petition to the Fifth Circuit filed Sept. 9, 2016 by Solicitor General on behalf of NLRB); *Epic Sys. Corp. v. Lewis*, No. 16-285 (petition to the Seventh Circuit filed Sept. 2, 2016 by employer); *Patterson v. Raymours Furniture Company, Inc.* No. 16-388 (petition to the Second Circuit filed Sept. 26, 2016 by employee). In *Raymours,* the panel members noted conflicting persuasive authority, but felt bound by the Second Circuit's earlier opinion in *Sutherland. Patterson v. Raymours Furniture Company, Inc.*, 2016 U.S. App. LEXIS 16240, at *5 (2d Cir. Sep. 2, 2016). In *SF Markets v. NLRB*, Case No. 16-60186 (5th Cir. Order

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[6] *Compare* **Ninth Circuit**: *Morris v. Ernst & Young LLP*, 1a, *and* **Seventh Circuit**: *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *with* **Eighth Circuit**: *Owen v. BristolCare, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016), **Fifth Circuit**: *Murphy Oil v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *and* **Second Circuit**: *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013), *Patterson v. Raymours Furniture Company, Inc.*, 726 F.3d 290 (2d Cir. 2016).

of July 26, 2016), Judge Dennis "urge[d]" the Fifth Circuit to "reconsider this issue *en banc*."

Successive *en banc* applications with uncertain results will not resolve the conflict with the urgency this issue requires. *En banc* applications may not resolve the conflict at all. In addition, the numerous pending cases raising the same issues and numerous amicus briefs all attest to the extreme importance of the issues presented.

B. The Decision Below Was Correct. The "Mode Of Analysis" Urged By The Dissent Below, The Petitioners, And The Amici, Conflicts with This Court's Precedents.

The decision of the Court of Appeal below is clearly correct. First, it is hard to conclude that the Separate Proceedings Clause is lawful. The Separate Proceedings Clause requires arbitration of employment disputes. It mandates that employees arbitrate only as individuals and in "separate proceedings." On its face, that clause prohibits "concerted activity" in arbitration of an employment dispute. "Concerted activities" in furtherance of resolution of employment grievances are protected by Section 7 of the NLRA. Under Section 8 of the NLRA it is unlawful to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7.

Were there any doubt, and Chief Judge Thomas correctly concluded there is not, 10a, the Separate Proceedings Clause must still fail as unlawful. The NLRB has forcefully and repeatedly interpreted Section 7 as rendering unlawful any term in an employment contract that prohibits concerted legal

action. *See, Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016). The NLRB's ruling is entitled to deference. *Id., see, also, Lechmere, supra.* 502 U.S. at 536; *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013), *citing, Delock v. Securitas Sec. Servs. USA*, 883 F. Supp. 2d 784 (E.D. Ark. 2012); *D.R. Horton v. NLRB*, 737 F.3d 344, 356 (5th Cir. 2013).

Therefore, the issue of the illegality of the Separate Proceedings Clause is settled, either as a matter of the plain meaning of the statute or as a matter of deference.

"The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in ... federal statutes. ... Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982), *citing. Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

In this case, the Petitioners, and the Dissent below seek to apply a rule that was developed for cases where it was claimed that "Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim." *Shearson/Am. Express v. McMahon*, 482 U.S. 220, (1987). *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012) is an example of such a case, as are *Shearson/Am. Express v. McMahon*, and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

In such cases it makes perfect sense to expect Congress to make clear its intent through a clear

"contrary congressional command." Absent such clarity, "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals [could] inhibit enforcement of the [Federal Arbitration] Act in controversies based on statutes." *Shearson/Am. Express v. McMahon*, *supra.* 482 U.S. at 226, *quoting, Mitsubishi Motors Corp., supra.*. 473 U.S. at 626-627, *quoting Wilko v. Swan,* 346 U.S. 427, 432 (1953) (internal quotations omitted).

However, where it is not arbitration *per se*, but a ***term of the arbitration agreement*** that is alleged to be unlawful, this Court's precedent has taken a different approach and considered "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3355 (1985). This Court's precedent recognizes that ***a term*** in an arbitration agreement may be unlawful and unenforceable. "That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

Congress or the Constitution, might create such illegality for many different reasons and in many different ways. Illegal terms might, through clever draftsmanship, find their way into an arbitration agreement.

For example, an arbitration clause might prohibit complaints to be filed with federal agencies such as the NLRB or the Equal Employment Opportunity Commission, and require those disputes to be submitted first to arbitration. Suits under the False Claims Act by employees who are aware of their

employer's fraudulent practices could be required, by a cleverly drafted contract, to be submitted to arbitration.

In cases where a ***term of the arbitration agreement*** is alleged to be illegal, the only sensible way to commence an analysis of enforceability is to determine if there is illegality. It makes no sense to start by seeking to determine if there was a "contrary congressional command" with respect to non-arbitrability because arbitrability is not really the issue. As Chief Judge Thomas memorably phrased it:

> The illegality of the "separate proceedings" term here has nothing to do with arbitration as a forum. It would equally violate the NLRA for Ernst & Young to require its employees to sign a contract requiring the resolution of all work-related disputes in court and in "separate proceedings." The same infirmity would exist if the contract required disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to that mechanism and (2) required separate individual proceedings. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims.

13a-14a.

Contract terms that are illegal and unenforceable in every other context do not magically become legal and enforceable by being included in an arbitration agreement. To hold that they do would place the power to nullify an act of Congress in the hands of

the corporate lawyers who draft employers' arbitration agreements.

Unlike the case of arbitration forum prohibition statutes, Congress need not have given a single thought to arbitration when it enacted a statute that renders certain contract terms unlawful or unenforceable. That surely was the case when the NLRA was passed. At that time, the FAA excluded all labor contracts that were within the reach of Congress to regulate under the Commerce Clause. *See,* 9 U.S.C. §1.[7] A few years earlier, the Norris-LaGuardia Act specifically repealed any prior statutes (the FAA was a prior statute) that interfered with the right of workers to engage in "concerted activities." *See,* 29 U.S.C. §115.

When Petitioners raised the argument of a conflict between the FAA and the NLRA the Court of Appeals was right to begin with the issue of illegality rather than, as the Dissent argued, beginning with the question of whether there is a "contrary congressional command." The approach used by the Court of Appeal does not disregard or diminish any argument that the FAA conflicts with the NLRA.

Simply enforcing the FAA and disregarding the NLRA, as urged by the Dissent below and the Petitioners, and as held by the Second, Fifth, and Eighth Circuit cases, is completely contrary to this Court's precedents. Courts "may not pick and choose

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[7] It was not until 2001 that it was established that contracts of employment, other than those expressly excluded by Section 1, were covered by the FAA. *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001); *see, also, Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-43 (1991) (Stevens, J. joined by Marshall, J. dissenting).

among congressional enactments. ..." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). "This Court has never refused to give effect to a duly passed federal statute absent a 'clear and manifest' Congressional intention to the contrary." *Id.* (citation omitted). "[S]o long as there is no positive repugnancy between two laws, such that enforcement of one would render ... the other wholly superfluous, a court must give effect to both." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)(internal quotations and citations omitted).

The Court of Appeals was correct in determining that the savings clause in Section 2 of the FAA eliminates the conflict between the NLRA and the FAA with respect to the Separate Proceedings Clause. 12a-14a. The savings clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (hereinafter "*Concepcion*"), *quoting, Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

As recognized in *Concepcion,* nothing in the Supreme Court's arbitration rulings undermines the statutory command in the FAA that generally applicable contract defenses, such as illegality under federal law are preserved by the savings clause in Section 2 of the FAA. *See, id.* at 343. (noting that Section 2 does not "preserve ***state-law rules*** that stand as an obstacle to the accomplishment of the FAA's objectives.") (emphasis supplied). Congress, unlike state legislatures or courts, has the right and the power to make certain contract terms illegal. When Congress choses to exercise that power, it is irrelevant whether that illegality "interfere[s] with

the fundamental attributes of arbitration." *Compare* 40a (Dissent).

The Court of Appeals was also correct in giving effect to both statutes, as this Court's precedent requires. The Court of Appeals correctly remanded to the District Court to determine if "there is a contractual basis for concluding that the part[ies] agreed" to "submit to class arbitration" in the event the Separate Proceedings Clause was invalidated. *See, Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S. Ct. 1758, 1775 (2010).

The approach adopted by the Court of Appeals, unlike the other approaches urged on this Court, gives proper respect to the FAA, the NLRA, and the right of parties "to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995), *quoting, Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). For those reasons, the decision by the Court of Appeals is correct and should be affirmed.

C. Under The Plain Language Of The Norris-LaGuardia Act, The Courts Of The United States May Not Enter An Order Enforcing The Separate Proceedings Clause Or Compelling Individual Arbitration.

Since the conflict between the Separate Proceedings Clause and the NLRA was "determinative," the Court of Appeals below did not find it necessary to address enforcement of the Separate Proceedings Clause under the Norris-LaGuardia Act. 24a-25a. However, if this Court were to disagree with Chief Judge Thomas' reasoning about the scope of the savings clause in Section 2 of the FAA, then this Court must determine whether it

has jurisdiction to enforce the Separate Proceedings Clause under Section 3 of the Norris-LaGuardia Act. 29 U.S.C. §103.

The same language in the NLRA that protects "***concerted activities for*** the purpose of collective bargaining or other ***mutual aid or protection***", also protects the same "concerted activities" under the Norris-LaGuardia Act. *Compare* 29 U.S.C. §157 *with* 29 U.S.C. §102. This Court concluded that the right to engage in "concerted activities" under Section 7 of the NLRA includes the right to pursue legal redress collectively. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566, (1978). For the same reasons, that same right is protected under Section 2 of the Norris-LaGuardia Act.

Under the express terms of the Norris-LaGuardia Act, once the Court determines that proceeding collectively in arbitration or Court is a protected "concerted activity," the Court is not allowed to "weigh" the policies animating the FAA against the policies animating the Norris-LaGuardia Act, or "reconcile" any conflict found to exist.

The Norris-LaGuardia Act contains an express repeal of prior inconsistent statutes in Section 15. It states: "**Repeal of conflicting laws**. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed." 29 U.S.C. §115. The FAA was passed in 1925, and the Norris-LaGuardia Act was passed in 1932. If the FAA conflicted with the Norris-LaGuardia Act, the parts of the FAA that were in conflict were repealed by Section 15.

Further, under the Norris-LaGuardia Act, any contract[8] containing a prohibited limitation on "concerted activities" by employees "shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." 29 U.S.C. §103. Whether that limitation is "a limitation upon the relief that can be accorded," or "a removal of jurisdiction," *see, Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 470, 127 S. Ct. 1397, 1406 (2007), the inexorable result in either case is that neither this Court nor any court of the United States may enforce the Separate Proceedings Clause. Neither this Court nor any court of the United States may enter an order compelling the Respondents to arbitrate their employment disputes "individually" and in "separate proceedings."

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[8] "Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act..." 29 U.S.C. §103.

CONCLUSION

For all of the above reasons, Respondents respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

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Respectfully Submitted,

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